

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SHAMAH MOODY,	)	Case No. CV 08-1607 JC
Plaintiff,	)	
v.	)	MEMORANDUM OPINION
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
Defendant.	)	

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**I. SUMMARY**

On November 19, 2008, plaintiff Shamah Moody (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have filed a consent to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; November 25, 2008 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the  
 2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge  
 3 (“ALJ”) are supported by substantial evidence and are free from material error.<sup>1</sup>

## 4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE** 5 **DECISION**

6 On October 15, 2003, plaintiff filed applications for Supplemental Security  
 7 Income benefits and Disability Insurance Benefits. (Administrative Record  
 8 (“AR”) 13, 60-62). Plaintiff asserted that he<sup>2</sup> became disabled on July 1, 2002,  
 9 due to severe manic depression, psychosis, memory loss, and anxiety attacks. (AR  
 10 84). An ALJ examined the record and heard testimony from plaintiff (who was  
 11 represented by counsel), medical expert Dr. Joseph Malancharuvil (who testified  
 12 telephonically), and a vocational expert on February 16, 2006 (“Pre-Remand  
 13 Hearing”). (AR 13, 323-60).

14 On April 27, 2006, the ALJ determined that plaintiff was not disabled  
 15 through the date of the decision (“Pre-Remand Decision”). (AR 13-19). The  
 16 Appeals Council denied plaintiff’s application for review of the ALJ’s Pre-  
 17 Remand Decision. (AR 5-9).

18 On September 12, 2007, this Court entered judgment reversing and  
 19 remanding the case for further proceedings because the articulated basis upon  
 20 which the ALJ discounted the opinion of plaintiff’s treating physician was not  
 21 supported by substantial evidence. (AR 373, 375-76). The Appeals Council in  
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 24 <sup>1</sup>The harmless error rule applies to the review of administrative decisions regarding  
 25 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196  
 26 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social  
Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of  
 application of harmless error standard in social security cases).

27 <sup>2</sup>Although Plaintiff’s Motion indicates that plaintiff is female (Plaintiff’s Motion at 2), the  
 28 record reflects that plaintiff’s middle name is David and that he is male. (See, e.g., AR 60  
 (Social Security Application referencing plaintiff’s middle name); AR 113-21 [Plaintiff’s  
 mother’s function report in which plaintiff’s mother refers to plaintiff as “he” and “him”]).

1 turn remanded the case for a new hearing. (AR 387-88). On remand the ALJ  
2 heard testimony from plaintiff (who again appeared with counsel), medical expert  
3 Dr. William Soltz, and a vocational expert on April 7, 2008 (“Post-Remand  
4 Hearing”). (AR 364, 568-98).

5 On July 22, 2008, the ALJ again determined that plaintiff was not disabled  
6 through the date of the decision (“Post-Remand Decision”).<sup>3</sup> (AR 13-19, 364-  
7 370). The ALJ found, *inter alia*, that plaintiff was not disabled at any time  
8 through the date of the decision. (AR 365, 370). Specifically, the ALJ found:  
9 (1) plaintiff suffered from the following severe impairments: major depressive  
10 disorder and polysubstance abuse (AR 366); (2) plaintiff’s impairments or  
11 combination of impairments, did not meet or medically equal one of the listed  
12 impairments (AR 366-67); (3) plaintiff could perform a full range of work at all  
13 exertional levels, but was limited to only moderately complex tasks up to 4 to 5  
14 steps, should not work around dangerous machinery or in jobs that involve high  
15 stress or the safety of others, and should avoid intense interaction with co-workers,  
16 supervisors and the public (AR 367, 368); (4) plaintiff had no past relevant work  
17 (AR 369); (5) there are jobs that exist in significant numbers in the national  
18 economy that plaintiff could perform (AR 369-70); and (6) plaintiff’s allegations  
19 regarding his limitations were not credible (AR 368).

### 20 **III. APPLICABLE LEGAL STANDARDS**

#### 21 **A. Sequential Evaluation Process**

22 To qualify for disability benefits, a claimant must show that he is unable to  
23 engage in any substantial gainful activity by reason of a medically determinable  
24 physical or mental impairment which can be expected to result in death or which  
25 has lasted or can be expected to last for a continuous period of at least twelve  
26 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.

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28 <sup>3</sup>The ALJ stated that his April 27, 2006 decision was incorporated by reference into, and thus supplemented by, his July 22, 2008 decision. (AR 364).

§ 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.
- (2) Is the claimant's alleged impairment sufficiently severe to limit his ability to work? If not, the claimant is not disabled. If so, proceed to step three.
- (3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.
- (4) Does the claimant possess the residual functional capacity to perform his past relevant work? If so, the claimant is not disabled. If not, proceed to step five.
- (5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow him to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-

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54 (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

In addition, a claimant who otherwise meets the definition of disability under the Social Security Act is not eligible to receive disability benefits if drug addiction or alcoholism is a “contributing factor material to the determination of disability.” 20 C.F.R. §§ 404.1535(a), 416.935(a). Such claimant has the burden to demonstrate that he would be disabled even if his substance abuse stopped. Parra v. Astrue, 481 F.3d 742, 748 (9th Cir. 2007), cert. denied, 128 S. Ct. 1068 (2008).

### **B. Standard of Review**

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must “consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner’s] conclusion.” Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ’s conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

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1 **IV. DISCUSSION**

2 **A. The ALJ Properly Evaluated the Opinions of Plaintiff's Treating**  
3 **Physician**

4 **1. Pertinent Facts**

5 **a. Opinions of Plaintiff's Treating Physician**

6 On February 15, 2006, plaintiff's treating physician at the Swift-Phoenix  
7 Clinic, Dr. Gurmit Sekhon, completed a Mental Work Capacity Evaluation.  
8 (AR 321-22). The Mental Work Capacity Evaluation stated in its instructions on  
9 the first page: "Please make your assessment apart from the effects of drug or  
10 alcohol use or abuse." (AR 321) (emphasis in original). The Mental Work  
11 Capacity Evaluation reflects that Dr. Sekhon: (i) diagnosed plaintiff with bipolar  
12 disorder and schizoaffective disorder (AR 322); (ii) checked the boxes indicating  
13 that plaintiff had severe limitations in his ability to: (a) perform activities within a  
14 schedule, maintain regular attendance, and be punctual within customary  
15 tolerances; (b) sustain an ordinary routine without supervision; (c) work in  
16 coordination with or in proximity to others without being distracted by them;  
17 (d) make simple work-related decisions; (e) interact appropriately with the general  
18 public; (f) ask simple questions or request assistance; (g) accept instructions and  
19 respond appropriately to criticism from supervisors; (h) get along with co-workers  
20 or peers without distracting them or exhibiting behavioral extremes; (i) maintain  
21 socially appropriate behavior and adhere to basic standards of neatness and  
22 cleanliness; (j) respond appropriately to changes in the work setting; (k) be aware  
23 of normal hazards and take appropriate precautions; and (l) set realistic goals or  
24 make plans independently of others (AR 321-22); (iii) checked the box indicating  
25 that plaintiff had marked limitations in his ability to: (a) remember locations and  
26 work-like procedures; (b) understand and remember very short and simple  
27 instructions; and (c) maintain attention and concentration for extended periods  
28 (AR 321); (iv) checked the box indicating that plaintiff had moderate limitations

1 in his ability to carry out very simple and short instructions (AR 321); (v) checked  
2 the box indicating that plaintiff was not a malingerer (AR 322); (vi) checked the  
3 box indicating that plaintiff's impairment lasted or could be expected to last at  
4 least twelve months (AR 322); and (vii) checked the box indicating that plaintiff  
5 would be expected to miss work at least three times a month. (AR 322).

6 The record contains outpatient notes from the Swift-Phoenix Clinic  
7 concerning plaintiff's ongoing psychiatric treatment by Dr. Sekhon and other  
8 treating medical personnel. (AR 270-79, 281-91, 293-99, 301-19, 412-13, 443-53,  
9 455-56, 464-68, 470-72, 479-84, 487-501).<sup>4</sup> The notes span the time period of  
10 February 18, 2004 to January 25, 2008, and reflect that plaintiff met with a  
11 physician approximately once a month. (AR 270-79, 281-91, 293-99, 301-19,  
12 412-13, 443-53, 455-56, 464-68, 470-72, 479-84, 487-501).

13 **b. Other Pertinent Medical Opinion Evidence**

14 On February 5, 2004, Dr. K. Gregg, a non-examining consultative  
15 physician, completed a Psychiatric Review Technique form. (AR 198-214). Dr.  
16 Gregg concluded, in pertinent part, that plaintiff's medical records revealed no  
17 evidence of cognitive defects, but that plaintiff was limited in his ability to interact  
18 with the public. (AR 214).

19 On October 6, 2006, Dr. Linda Smith, an examining consultative  
20 psychiatrist, conducted a complete psychiatric evaluation of plaintiff. (AR 414-  
21 22). Dr. Smith found, in pertinent part, that there was "no evidence at all" of  
22 plaintiff's claimed mental impairments, that plaintiff was not credible, and that  
23 plaintiff was not limited in his ability to work. (AR 421). Dr. Smith stated that  
24 plaintiff's previous psychological problems were likely due to plaintiff's drug use,  
25 which plaintiff claimed he had discontinued. (AR 421).

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28 <sup>4</sup>The Administrative Record contains duplicate copies of medical reports from the Swift-  
Phoenix Clinic. (AR 270-74, 276, 278-79, 296-99, 307-19, 464, 470, 472, 481, 487-90, 493-  
501).



1 On October 18, 2006, Dr. H. Amado, a non-examining consultative  
2 physician, completed a Psychiatric Review Technique form (AR 424-35), and a  
3 related Mental Residual Functional Capacity Assessment (AR 436-38). Dr.  
4 Amado concluded, in pertinent part, that plaintiff had a medically determinable  
5 impairment of polysubstance abuse, but stated that he was unable to tell whether it  
6 was in remission given that plaintiff's records showed plaintiff had a history of  
7 drug use, yet plaintiff denied drug use when Dr. Smith examined him. (AR 430).  
8 Dr. Amado's Mental Residual Functional Capacity Assessment showed plaintiff  
9 had moderate limitations in his ability to understand, remember, and carry out  
10 detailed instructions, but otherwise had no other significant mental limitations.  
11 (AR 436-38).

12 **c. Plaintiff's Pertinent Testimony**

13 At the Pre-Remand Hearing, plaintiff testified to the following: He rarely  
14 drank alcohol. He did not use marijuana often. He had last used  
15 methamphetamine in 2003. His doctor had not told plaintiff it was acceptable to  
16 drink while taking his prescribed medication. Plaintiff saw Dr. Sekhon<sup>5</sup> every four  
17 to five weeks. Plaintiff told Dr. Sekhon that he drank once in a while and smoked  
18 marijuana, but the doctor "didn't suggest it." (AR 331-32, 336, 338).

19 At the Post-Remand hearing, plaintiff testified to the following: He then  
20 drank alcohol three to four times a week to the point of becoming drunk, and then  
21 used methamphetamine two or three times a week. (AR 579). Since July 2002, he  
22 had not remained off all drugs or alcohol for more than a six month continuous  
23 period of time. (AR 592).

24 **d. Medical Expert Testimony**

25 At the Post-Remand Hearing, the ALJ called William Soltz, Ph.D. to testify  
26 as a medical expert with respect to plaintiff's mental impairments. (AR 364, 368,  
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28 <sup>5</sup>The transcript of the Pre-Remand Hearing incorrectly reflects that plaintiff's treating physician's name is spelled "Dr. Chicon." (AR 333).



1 573-89). Dr. Soltz thoroughly reviewed plaintiff's psychological records and  
2 questioned plaintiff about his drug and alcohol use. (AR 573-77). In light of  
3 plaintiff's testimony and the medical evidence in the record, Dr. Soltz opined:  
4 Plaintiff had medically determinable psychological impairments of depressive  
5 disorder and polysubstance abuse. (AR 577, 579). Due to the combined effects of  
6 plaintiff's two impairments, plaintiff (i) should not work around heights,  
7 dangerous equipment, automobiles or similar hazards, or in jobs where the security  
8 of others is involved (AR 581, 584-85); (ii) should not work in high stress  
9 positions (*e.g.* armed security, bill collector) (AR 581, 585); (iii) could perform  
10 only moderately complex tasks up to four to five steps (AR 585); and (iv) should  
11 avoid intense interaction with co-workers, supervisors and the public (AR 585).

12 Dr. Soltz further opined: It was very difficult accurately to discern whether  
13 plaintiff's functional limitations were due primarily to one or both of plaintiff's  
14 medically determinable impairments. (AR 577-79). Optimally a person should be  
15 allowed to detoxify from alcohol and drugs for at least nine months before an  
16 accurate diagnosis of any underlying psychological condition could be made apart  
17 from symptoms related to substance abuse. (AR 578, 581). Here, although there  
18 were "intermittent periods" during which plaintiff had stopped using drugs and  
19 alcohol, no such period had lasted longer than seven months. (AR 580-81). The  
20 record did, however, reflect that when plaintiff reduced his drug and alcohol use,  
21 plaintiff's symptoms improved. (AR 580). Thus, based on the existing records,  
22 plaintiff's substance abuse likely was the primary cause of plaintiff's depressive  
23 disorder and any hallucinations and paranoia plaintiff may have experienced, and  
24 plaintiff's participation in a substance abuse program could eliminate 50 to 75  
25 percent of his functional limitations "pathology."<sup>6</sup> (AR 577-78, 582, 587).

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28 <sup>6</sup>Dr. Soltz also testified: When a person has not sufficiently detoxified, the most  
common cause of depression is drug and/or alcohol use. (AR 578). Heavy abuse of alcohol and  
drugs mimic a major depressive type disorder. Methamphetamine use could cause both  
hallucinations and delusions. (AR 577, 582).

1 Dr. Soltz further testified: The severe functional limitations stated in Dr.  
2 Sekhon's opinions were unsupported by any other medical evidence in the record.  
3 (AR 580-83). However, Dr. Soltz was unable to tell whether Dr. Sekhon's own  
4 examinations of plaintiff supported such substantial limitations, since Dr.  
5 Sekhon's treatment notes were mostly unintelligible. (AR 581-82, 588-89).  
6 While Dr. Sekhon's opinions could be correct, Dr. Soltz did not believe they were.  
7 (AR 581, 588).

8 **e. ALJ's Residual Functional Capacity Assessment**

9 In the Post-Remand Decision, the ALJ summarized the medical evaluations,  
10 the treatment records and the testimony of plaintiff and medical expert Dr. Soltz,  
11 and gave "careful consideration [to] the entire record." (AR 367-69). As noted  
12 above, the ALJ determined that, even when accounting for the effects of plaintiff's  
13 drug and alcohol use, plaintiff had the residual functional capacity to perform a  
14 full range of work at all exertional levels, but was limited to only moderately  
15 complex tasks up to 4 to 5 steps, should not work around dangerous machinery, or  
16 in jobs that involve high stress or the safety of others, and should avoid intense  
17 interaction with co-workers, supervisors and the public. (AR 367). The ALJ  
18 based his residual functional capacity assessment on, *inter alia*, Dr. Soltz's  
19 testimony regarding plaintiff's functional limitations, and plaintiff's own  
20 testimony regarding his drug and alcohol use. (AR 368).

21 The ALJ rejected almost all of the opinions expressed in Dr. Sekhon's  
22 Mental Work Capacity Evaluation of plaintiff, giving the following reasons:

23 Regarding Exhibit 10F [AR 320-22], Dr. Sekhom's evaluation  
24 indicates [plaintiff] is extremely limited in almost all activities  
25 although he noted [plaintiff] is only moderately limited in his ability  
26 to carry out short and simple instructions. There is virtually no  
27 evidence in the record to support this evaluation. Granted, Dr.  
28 Sekhom's records are unreadable, but there is no treatment found for

1 drug/alcohol abuse, indicating that [plaintiff] did not admit drug use.

2 At the hearing, [plaintiff] admitted drug use throughout the relevant  
3 period. Social Security disability [] claimants have the burden of  
4 proving disability and [plaintiff] bears the burden of proving that drug  
5 or alcohol addiction is not a contributing factor material to his  
6 disability.

7 (AR 369).

## 8 **2. Pertinent Law**

9 In Social Security cases, courts employ a hierarchy of deference to medical  
10 opinions depending on the nature of the services provided. Courts distinguish  
11 among the opinions of three types of physicians: those who treat the claimant  
12 (“treating physicians”) and two categories of “nontreating physicians,” namely  
13 those who examine but do not treat the claimant (“examining physicians”) and  
14 those who neither examine nor treat the claimant (“nonexamining physicians”).  
15 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995), as amended (9th Cir. 1996)  
16 (footnote reference omitted). A treating physician’s opinion is entitled to more  
17 weight than an examining physician’s opinion, and an examining physician’s  
18 opinion is entitled to more weight than a nonexamining physician’s opinion.<sup>7</sup> See  
19 id. In general, the opinion of a treating physician is entitled to greater weight than  
20 that of a non-treating physician because the treating physician “is employed to  
21 cure and has a greater opportunity to know and observe the patient as an  
22 individual.” Morgan v. Commissioner of Social Security Administration, 169  
23 F.3d 595, 600 (9th Cir. 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th  
24 Cir. 1987)).

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27 <sup>7</sup>Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to  
28 draw bright line distinguishing treating physicians from non-treating physicians; relationship is  
better viewed as series of points on a continuum reflecting the duration of the treatment  
relationship and frequency and nature of the contact) (citation omitted).

1 The treating physician's opinion is not, however, necessarily conclusive as  
 2 to either a physical condition or the ultimate issue of disability. Magallanes v.  
 3 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d  
 4 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician's opinion is not  
 5 contradicted by another doctor, it may be rejected only for clear and convincing  
 6 reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal  
 7 quotations omitted). The ALJ can reject the opinion of a treating physician in  
 8 favor of a conflicting opinion of another examining physician if the ALJ makes  
 9 findings setting forth specific, legitimate reasons for doing so that are based on  
 10 substantial evidence in the record. Id. (citation and internal quotations omitted);  
 11 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by  
 12 setting out detailed and thorough summary of facts and conflicting clinical  
 13 evidence, stating his interpretation thereof, and making findings) (citations and  
 14 quotations omitted); Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite  
 15 "magic words" to reject a treating physician opinion – court may draw specific and  
 16 legitimate inferences from ALJ's opinion). "The ALJ must do more than offer his  
 17 conclusions." Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). "He must  
 18 set forth his own interpretations and explain why they, rather than the  
 19 [physician's], are correct." Id. "Broad and vague" reasons for rejecting the  
 20 treating physician's opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599,  
 21 602 (9th Cir. 1989).

22 When they are properly supported, the opinions of physicians other than  
 23 treating physicians, such as examining physicians and non-examining medical  
 24 experts, may constitute substantial evidence upon which an ALJ may rely. See,  
 25 e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative  
 26 examiner's opinion on its own constituted substantial evidence, because it rested  
 27 on independent examination of claimant); Morgan, 169 F.3d at 600 (testifying  
 28 medical expert opinions may serve as substantial evidence when "they are

supported by other evidence in the record and are consistent with it”). Where, as here, a conflict exists between the assessment of a non-examining, testifying physician based on objective clinical findings and the assessment of a treating physician, the non-examining physician’s opinion may itself constitute substantial evidence warranting rejection of the treating doctor’s opinion, and it is the sole province of the ALJ to resolve the conflict. Morgan, 169 F.3d at 600; Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

### 3. Analysis

Plaintiff contends that the ALJ failed adequately to consider the opinions expressed in Dr. Sekhon’s Mental Work Capacity Evaluation. (Plaintiff’s Motion at 3-6). More specifically, plaintiff alleges that the ALJ inadequately addressed and/or ignored evidence that Dr. Sekhon reached his opinions without including the effects of plaintiff’s substance abuse. (Plaintiff’s Motion at 5-6). This Court concludes that the ALJ did not materially err in evaluating the record medical evidence.

First, the ALJ properly discredited Dr. Sekhon’s opinions as unsupported by the record as a whole. Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004). Dr. Sekhon diagnosed plaintiff with bipolar disorder and schizoaffective disorder and concluded that plaintiff was severely limited in almost all ability to function in a work environment. (AR 321-22). As the ALJ correctly noted, however, no medical evidence in the record supports such significant functional limitations. Dr. Soltz testified that he also found no support in the record for the treating physician’s limitations, even when symptoms related to plaintiff’s drug and alcohol use were considered. (AR 577-88). Other medical opinion evidence in the record is in accord with Dr. Soltz’s findings. (AR 214, 421, 436-38). Dr. Soltz’s assessment, supported by and consistent with the bulk of plaintiff’s medical evidence, constitutes substantial evidence in support of the

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1 ALJ's decision to reject Dr. Sekhon's conflicting opinions. Morgan, 169 F.3d at  
2 600.

3 Second, even though the Mental Work Capacity Evaluation form completed  
4 by Dr. Sekhon instructed him to make an assessment apart from the effects of drug  
5 or alcohol use or abuse, this Court concludes based on the current record, and  
6 particularly plaintiff's testimony at the Post-Remand Hearing regarding his  
7 alcohol and drug use, that the ALJ did not materially err in rejecting Dr. Sekhon's  
8 opinions, as the record does not reflect that Dr. Sekhon was ever aware of the  
9 extent of plaintiff's drug and alcohol use and abuse and thus in a position to  
10 discount such use and abuse in making an assessment as the form instructed. The  
11 record reflects that plaintiff has a significant history of drug and alcohol use. (AR  
12 368, 417-18, 430, 573-76). Dr. Soltz testified that plaintiff likely had not been  
13 candid with medical personnel about the true extent of his drug and alcohol use,  
14 since none of plaintiff's medical records – including those from other physicians at  
15 the Swift-Phoenix clinic where Dr. Sekhon practiced – reflects that plaintiff had  
16 ever been referred for substance abuse treatment. (AR 586). Similarly, Dr.  
17 Sekhon's failure to diagnose plaintiff with substance abuse suggests that plaintiff  
18 had not been candid with his treating physician about the magnitude of his drug  
19 and alcohol use. (AR 587). In fact, plaintiff's testimony suggests that plaintiff  
20 admitted to Dr. Sekhon only nominal drug and alcohol use. (AR 331-32, 336,  
21 338). Accordingly, this Court now concludes that the ALJ reasonably inferred that  
22 Dr. Sekhon was unaware of the extent of plaintiff's drug use, and thus could not  
23 have rendered his opinions apart from the effects of plaintiff's drug or alcohol use  
24 on plaintiff's ability to work despite the instructions on the form to do so.

25 Accordingly, the ALJ's rejection of Dr. Sekhon's opinions is supported by  
26 substantial evidence and is free from material error.

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1           **B.     The ALJ Did Not Materially Err in Developing the Record**

2           Plaintiff contends that the ALJ failed properly to develop the record by  
3 declining plaintiff's request for an orthopedic consultative examination of his  
4 ankle. (Plaintiff's Motion at 6). The Court finds harmless any error in the ALJ's  
5 decision to decline plaintiff's request.

6                   **1.     Pertinent Facts**

7           At the Post-Remand Hearing, plaintiff stated that ten months earlier he had  
8 sustained a "minor" break in his right ankle which had subsequently become  
9 infected. (AR 572). At the end of such hearing, plaintiff's attorney asked the ALJ  
10 to order an orthopedic consultative examination, stating that plaintiff's injury and  
11 confinement to a wheelchair could be probative of disability. (AR 596). The ALJ  
12 declined the request, and instead asked the vocational expert to testify to whether  
13 plaintiff's confinement to a wheelchair changed the expert's earlier conclusion  
14 that jobs existed in significant numbers in the national economy which plaintiff  
15 could do. (AR 596-97). The vocational expert testified that it did not. (AR 596-  
16 97).

17           In his Post-Remand Decision, the ALJ stated that he had declined plaintiff's  
18 request for a consultative examination due to the "lack of objective evidence."  
19 (AR 368-69). The ALJ noted that "there was no evidence in the record of  
20 [plaintiff's] break or of the prescription for a wheelchair." (AR 368). The ALJ  
21 also stated that medical records submitted at the hearing reflected that plaintiff had  
22 undergone ankle surgery on June 5, 2007, but that subsequent x-rays showed that  
23 plaintiff's condition was stable. (AR 369) (citing Ex. 19F [AR 541]). The ALJ  
24 rejected plaintiff's suggestion that plaintiff met listings 1.02A or 1.03, stating that  
25 the evidence did not support such a finding or a finding that any impairment could  
26 be expected to last more than 12 months. (AR 369).

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## 2. Pertinent Law

Although plaintiff bears the burden of proving disability, the ALJ has an affirmative duty to assist the claimant in developing the record “when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence.” Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted); Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001); see also Webb, 433 F.3d at 687 (ALJ has special duty fully and fairly to develop record and to assure that claimant’s interests are considered). Where it is necessary to enable the ALJ to resolve an issue of disability, the duty to develop the record may require consulting a medical expert or ordering a consultative examination. See 20 C.F.R. §§ 404.1519a, 416.919a; see, e.g., Armstrong v. Commissioner of Social Security Administration, 160 F.3d 587, 590 (9th Cir. 1998) (where there were diagnoses of mental disorders prior to the date of disability found by the ALJ, and evidence of those disorders even prior to the diagnoses, the ALJ was required to call a medical expert to assist in determining when the plaintiff’s impairments became disabling).

The ALJ is not obliged to undertake the independent exploration of every conceivable condition or impairment a claimant might assert. Therefore, an ALJ does not fail in his duty to develop the record by not seeking evidence or ordering further examination or consultation regarding a physical or mental impairment if no medical evidence indicates that such an impairment exists. See Breen v. Callahan, 1998 WL 272998, at \*3 (N.D. Cal. May 22, 1998) (noting that, in the Ninth Circuit, the ALJ’s obligation to develop the record is triggered by “the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision”) (citing Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Wainwright v. Secretary of Health and Human Services, 939 F.2d 680, 682 (9th Cir. 1991)); see also Pearson v. Bowen, 866 F.2d 809, 812 (5th Cir. 1989) (requiring that claimant must “raise a

1 suspicion concerning such an impairment” before ALJ is required to discharge  
 2 duty of full inquiry by ordering a consultative examination).

### 3                   **3.     Analysis**

4           The Court rejects plaintiff’s contention that the ALJ’s decision to decline  
 5 plaintiff’s request for a consultative examination warrants a reversal or remand.

6           First, plaintiff was obligated to provide the ALJ with *some* objective  
 7 medical evidence of a condition which could have a material impact on the ALJ’s  
 8 disability decision. Breen, 1998 WL 272998, at \*3. However, as reflected in the  
 9 Post-Remand Decision, the ALJ reviewed the medical records plaintiff submitted  
 10 at the hearing and concluded that there was no objective evidence that plaintiff  
 11 continued to suffer from an ankle break, that he had a prescription for a  
 12 wheelchair, or that any impairment from the alleged injury would last more than  
 13 twelve months. (AR 368-69). Plaintiff fails to point to any objective evidence in  
 14 the record to suggest the contrary. In fact, plaintiff appears to concede as much,  
 15 stating: “[T]he purpose for a consultative examination was to provide objective  
 16 evidence regarding [plaintiff’s] ankle break and the prescription for a wheelchair.”  
 17 (Plaintiff’s Motion at 7 (emphasis added)). Absent such objective evidence,  
 18 however, the ALJ had no duty to order a consultative examination for plaintiff at  
 19 government expense. See Diaz v. Secretary of Health and Human Services, 898  
 20 F.2d 774, 778 (10th Cir. 1990) (ALJ has broad discretion to deny request for  
 21 consultative examination where claimant fails to present objective evidence  
 22 supporting claimed impairment); see also Reed v. Massanari, 270 F.3d 838, 842  
 23 (9th Cir. 2001) (“The government is not required to bear the expense of [a  
 24 consultative] examination for every claimant) (citing id.; 20 C.F.R.  
 25 §§ 404.1517-1519t, 416.917-919t); Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir.  
 26 1991) (decision to order consultative examination rests within ALJ’s discretion)  
 27 (citation omitted).

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1 Second, the decision to call a medical expert for additional evidence on the  
 2 nature and severity of impairments is required only “[w]hen . . . in the opinion of  
 3 the [ALJ] or the Appeals Council the symptoms, signs and laboratory findings  
 4 reported in the case record suggest that a judgment of equivalence may be  
 5 reasonable.” SSR 96-6p. Here, the ALJ reasonably determined that the medical  
 6 records did not suggest that plaintiff’s ankle injury met a Listing, and plaintiff  
 7 offers no plausible theory of equivalency. See Sullivan v. Zebly, 493 U.S. 521,  
 8 530-31 (1990) (For a claimant to show that his impairment matches [or is  
 9 equivalent to] a listing, it must meet all of the specified medical criteria [of the  
 10 listed impairment].”).

11 Finally, even assuming, *arguendo*, that the ALJ’s decision not to order a  
 12 consultative examination was erroneous, any such error was harmless. The  
 13 vocational expert testified that there were still jobs that existed in significant  
 14 numbers in the national economy that plaintiff could perform even assuming he  
 15 was confined to a wheelchair. (AR 596-97).

16 In light of the foregoing, a remand or reversal on this basis is not warranted.

## 17 **C. The ALJ Properly Evaluated Plaintiff’s Credibility**

### 18 **1. Additional Pertinent Facts**

19 In written statements submitted in support of his application for benefits,  
 20 plaintiff stated: He had difficulty sleeping and concentrating, was restless,  
 21 suffered from anxiety attacks, paranoia, depression, psychosis, and had memory  
 22 loss. (AR 78, 82, 84, 105-11, 122, 126, 128-29).

23 At the Pre-Remand Hearing, plaintiff testified that he had experienced  
 24 auditory hallucinations. (AR 349-51).

25 In his written decisions, the ALJ noted that plaintiff’s symptoms included  
 26 hallucinations, psychosis, confusion and depression. (AR 14, 368). The ALJ  
 27 found that plaintiff’s medically determinable impairments could reasonably be  
 28 expected to produce such symptoms, but determined that plaintiff’s statements

1 concerning the intensity, persistence and limiting effects of his subjective  
2 complaints were not credible. (AR 15, 368). The ALJ provided three reasons for  
3 discounting plaintiff's subjective complaints.

4 First, the ALJ pointed out that plaintiff's subjective complaints were  
5 inconsistent with plaintiff's failure to seek treatment for his substance abuse.  
6 Specifically, the ALJ stated:

7 Any attempt to dismiss [plaintiff's] history of substance abuse as "self  
8 medication for his mental illness" does not negate the fact that  
9 [plaintiff] continued to engage in substance abuse. There is evidence  
10 of continued substance abuse up to the present. It is reasonable to  
11 assume that were [plaintiff] suffering from the disabling mental  
12 problems alleged, he would stop substance abuse and he would  
13 receive ongoing, aggressive substance rehabilitation.

14 (AR 15).

15 Second, the ALJ noted several occasions when plaintiff gave conflicting  
16 statements regarding his drug and alcohol use. (AR 368). Specifically, the ALJ  
17 stated the following about plaintiff's answers to the medical expert's questions at  
18 the Post-Remand Hearing:

19 At the hearing, . . . [plaintiff] stated that he last used drugs in  
20 2002 and in 2003 he used methamphetamine. At the time he started  
21 on Seroquel and has not used since. Then, [plaintiff] testified he last  
22 used drugs on January 16, 2004, was using drugs in 2004, and in  
23 2005 there is a blood test lab result that shows drug use. He stated he  
24 still uses drugs when he gets flustered and when his meds are not  
25 working which happens 3 or 4 times a week. The medical expert  
26 noted that on October 6, 2006, [plaintiff] reported to [] Dr. Smith at a  
27 psychiatric evaluation that he was drinking up to 24 ounces of malt  
28 liquor about 3 times a week. He said he used to drink more but had

1 decreased drinking in 2003. His last drink was the previous night  
2 (see Exhibit 11F p.4) [AR 417]. [Plaintiff] admitted at the hearing  
3 that he did drink 3 times a week but not so much anymore. He stated  
4 that . . . when his medication was not working he used drugs and  
5 alcohol.

6 (AR 368).

7 Finally, the ALJ cited plaintiff's poor work history as evidence of plaintiff's  
8 lack of credibility: "I note that [plaintiff] has not performed any substantial  
9 gainful activity in the past 15 years. This lack of work history indicates that  
10 [plaintiff's] pursuit of disability status may be motivated by a desire to finance his  
11 chosen lifestyle, rather than motivated by an actual disability." (AR 15)

## 12 **2. Pertinent Law**

13 An ALJ is not required to believe every allegation of disabling pain or other  
14 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)  
15 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes  
16 the existence of a medically determinable impairment that could reasonably give  
17 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as  
18 to the credibility of the claimant's statements about the symptoms and their  
19 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the  
20 record includes objective medical evidence that the claimant suffers from an  
21 impairment that could reasonably produce the symptoms of which the claimant  
22 complains, an adverse credibility finding must be based on clear and convincing  
23 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d  
24 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does  
25 not apply is when there is affirmative evidence of malingering. Id. The ALJ's  
26 credibility findings "must be sufficiently specific to allow a reviewing court to  
27 conclude the ALJ rejected the claimant's testimony on permissible grounds and

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1 did not arbitrarily discredit the claimant's testimony." Moisa v. Barnhart, 367  
2 F.3d 882, 885 (9th Cir. 2004).

3 To find the claimant not credible, an ALJ must rely either on reasons  
4 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal  
5 contradictions in the testimony, or conflicts between the claimant's testimony and  
6 the claimant's conduct (*e.g.*, daily activities, work record, unexplained or  
7 inadequately explained failure to seek treatment or to follow prescribed course of  
8 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at  
9 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant's  
10 testimony solely because it is not substantiated affirmatively by objective medical  
11 evidence, the lack of medical evidence is a factor that the ALJ can consider in his  
12 credibility assessment. Burch, 400 F.3d at 681.

13 Questions of credibility and resolutions of conflicts in the testimony are  
14 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th  
15 Cir. 2006). If the ALJ's interpretation of the claimant's testimony is reasonable  
16 and is supported by substantial evidence, it is not the court's role to  
17 "second-guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

### 18 **3. Analysis**

19 Plaintiff contends that the ALJ improperly evaluated his credibility.  
20 (Plaintiff's Motion at 8-10). The Court concludes that the ALJ stated clear and  
21 convincing reasons for discounting plaintiff's statements which are supported by  
22 substantial evidence. Accordingly, a reversal or remand based upon the ALJ's  
23 assessment of plaintiff's credibility is not warranted.

24 First, the ALJ reasonably discredited plaintiff's subjective complaints as  
25 inconsistent with the level of treatment he received. The ALJ noted that plaintiff  
26 had a significant history of drug and alcohol use, and plaintiff himself testified that  
27 he had been unable to remain clean and sober for more than four or five months at  
28

1 a time, yet plaintiff sought no treatment for drug or alcohol abuse.<sup>8</sup> (AR 368).  
 2 The medical expert testified that (i) plaintiff's subjective symptoms were most  
 3 accurately attributed to plaintiff's substance abuse (AR 577-78, 582, 587);  
 4 (ii) evidence in the record reflects that when plaintiff reduced his drug and alcohol  
 5 use, plaintiff's symptoms improved (AR 580); (iii) plaintiff needed to be in a  
 6 substance abuse program to address those symptoms (AR 587); and (iv) plaintiff  
 7 had received no such treatment (AR 586). It was reasonable for the ALJ to infer  
 8 that if plaintiff's mental problems were as severe as he expressed, he would have  
 9 sought and been prescribed substance abuse treatment. In assessing credibility,  
 10 the ALJ may properly rely on plaintiff's unexplained failure to request treatment  
 11 consistent with the alleged severity of his symptoms. Bunnell v. Sullivan, 947  
 12 F.2d 341, 346 (9th Cir. 1991) (en banc) (ALJ may discredit plaintiff's subjective  
 13 complaints based on "unexplained, or inadequately explained, failure to seek  
 14 treatment or follow a prescribed course of treatment.") (citation omitted); Tidwell  
 15 v. Apfel, 161 F.3d 599, 602 (9th Cir. 1999) (lack of treatment and reliance upon  
 16 nonprescription pain medication "clear and convincing reasons for partially  
 17 rejecting [claimant's] pain testimony"); cf. Wodtli v. Astrue, 2008 WL 4104216,  
 18 at \*6 (N.D. Cal. Sept. 2, 2008) (ALJ properly discredited plaintiff's testimony in  
 19 light of plaintiff's failure to follow doctor's instruction to discontinue using  
 20 alcohol).

21 Second, the ALJ could properly discredit plaintiff's subjective complaints  
 22 due to plaintiff's conflicting statements and testimony regarding his drug and  
 23 alcohol use. See Light v. Social Security Administration, 119 F.3d 789, 792 (9th  
 24 Cir.), as amended (1997) (in weighing plaintiff's credibility, ALJ may consider  
 25 "inconsistencies either in [plaintiff's] testimony or between his testimony and his  
 26 conduct"); see also Fair, 885 F.2d at 604 n.5 (9th Cir.1989) (ALJ can reject pain

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28 <sup>8</sup>Plaintiff also testified that he did not attend meetings of Alcoholics Anonymous or  
 Narcotics Anonymous. (AR 333).



1 testimony based on contradictions in plaintiff's testimony). At the Post-Remand  
2 Hearing, plaintiff testified that he had had a significant problem with  
3 methamphetamine in 2002 and 2003, but after being placed on medication, he had  
4 stopped using the drug. (AR 573-74). However, upon further questioning by the  
5 medical expert, plaintiff testified that he had actually stopped using  
6 methamphetamine and marijuana by the end of 2004. (AR 574). When confronted  
7 with a blood test that showed that he had used drugs in 2005, plaintiff admitted  
8 that he had been using drugs and alcohol through the date of the hearing. (AR  
9 575). Plaintiff testified that he used methamphetamine "three or four times a  
10 week," and drank alcohol three times a week "until [he was] drunk." (AR 575).  
11 In addition, plaintiff told Dr. Smith that he drank less than 24-ounces of malt  
12 liquor about three times a week, that he smoked marijuana "a little bit," and did  
13 not use any other drugs at that time, even though his testimony indicates  
14 otherwise. (AR 368). The ALJ properly discounted plaintiff's subjective  
15 complaints due to plaintiff's obvious lack of candor regarding his drug and alcohol  
16 use. See Thomas, 278 F.3d at 959 (holding that the ALJ did not err in using the  
17 claimant's conflicting statements about her alcohol and drug use to discredit her  
18 testimony) (citing Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999)).

19 Finally, the ALJ discounted plaintiff's subjective complaints, in part due to  
20 plaintiff's failure to perform substantial gainful activity in the 15 years preceding  
21 the ALJ's April 27, 2006 decision. (AR 15). An ALJ may discredit a claimant's  
22 testimony in light of a poor work history. Thomas, 278 F.3d at 959 (claimant's  
23 "extremely poor work history" and demonstrated lack of "propensity to work in  
24 her lifetime" constituted clear and convincing reasons for discounting claimant's  
25 credibility); see SSR 96-7P (when assessing credibility ALJ may consider, *inter*  
26 *alia*, "[claimant's] prior work record and efforts to work."). Here, however, the  
27 this reason for discounting plaintiff's testimony is not clear and convincing, since  
28 plaintiff was 27 years old at the time of Pre-Remand Decision, and thus could not

1 likely have had a prior legal work history that spanned 15 years. (AR 14, 15).  
2 Nonetheless, even if this basis for the ALJ's credibility determination was  
3 deficient, any such error was harmless because the ALJ's remaining reasons for  
4 discrediting plaintiff's subjective symptom testimony are supported by substantial  
5 evidence and the foregoing error does not negate the validity of the ALJ's ultimate  
6 credibility conclusion in this case. See Carmickle, 533 F.3d at 1162 (Where some  
7 reasons supporting an ALJ's credibility analysis are found invalid, the error is  
8 harmless if (1) the remaining reasons provide substantial evidence to support the  
9 ALJ's credibility conclusions, and (2) "the error does not negate the validity of the  
10 ALJ's ultimate credibility conclusion.") (quoting Batson, 359 F.3d at 1195)  
11 (citation and internal quotation marks omitted).

12 Accordingly, plaintiff is not entitled to a reversal or remand on this basis.

13 **V. CONCLUSION**

14 For the foregoing reasons, the decision of the Commissioner of Social  
15 Security is affirmed.

16 LET JUDGMENT BE ENTERED ACCORDINGLY.

17 DATED: January 25, 2010

18 /s/

19 Honorable Jacqueline Chooljian  
20 UNITED STATES MAGISTRATE JUDGE  
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